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IN THE STATE OF FLORIDA
FIFTH DISTRICT COURT OF APPEAL

5 DCA CASE NO. 96-2406
L.T. CASE NO. CI95-5032

KEVIN E. BRYAN and RENEE M. BRYAN,

Plaintiffs/Appellants,

vs.

KENNETH M. CLAYTON and NEAL MCCULLOH individually and doing business as CLAYTON & MCCULLOH, a Florida general partnership,

Defendants/Appellees,

and vs.

AMBER RIDGE HOMEOWNERS' ASSOCIATION, INC., a Florida corporation,

Defendant.

BRYANS' MOTION TO STAY OR RECALL MANDATE, AND NOTICE OF SUPPLEMENTAL AUTHORITY

The appellants, KEVIN E. BRYAN and RENEE M. BRYAN, pursuant to Fla. R. App. P. 9.300 and 9.210(g) file this motion to stay or recall mandate, and notice of supplemental authority, and say:

Background

1. This court issued its decision affirming the lower court on May 9, 1997. On May 27, 1997, the Bryans timely filed a motion for clarification, rehearing, rehearing *en banc*, and certification, and for ancillary relief, which was denied by order dated June 25, 1997.

2. Accordingly, under Fla. R. App. P. 9.340(b), this court's mandate is due to be issued fifteen days after June 25, 1997, or on July 10, 1997. However, for reasons set forth below, the Bryans urge that this court should stay the issuance of said mandate and withdraw its opinion, or recall the mandate if it has already been issued by the time this court reviews the instant motion.

Basis for Motion

3. This court's opinion of May 9, 1997 was expressly based upon five federal district court decisions, the latest of which was *Riter v. Moss & Bloomberg, Ltd.*, 932 F.Supp. 210 (N.D. Ill. 1996).

4. However, on July 2, 1997, *Riter* was reversed, and all of the precedential authorities cited by this court were expressly repudiated by the United States Court of Appeals for the Seventh Circuit in a nine page opinion in *Newman v. Boehm, Pearlstein & Bright, Ltd.*, Nos. 96-2839 and 96-2841, ___ F.3d ___ (7th Cir. July 2, 1997). A true copy of the court's slip opinion is attached.

5. *Newman* is the first federal appellate court (and the only appellate court other than this court) to expressly construe the federal legislation implicated herein on the exact issues involved in this appeal. (As

noted in *Newman* and the Bryans' briefs, the appellate affirmance in *Azar v. Hayter*, 66 F.3d 342 (11th Cir. 1995) was a PCA without opinion, on an appeal by a *pro se* litigant, and the reasons for affirmance are thus open to speculation.) Further, although *Newman* is a panel decision, the conclusions drawn in *Newman* and the two earlier seventh circuit cases upon which it relied (*Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997) and *Ryan v. Wexler & Wexler*, 113 F.3d 91 (7th Cir. 1997)), and the fact that all three cases had different panels, render *Newman* as being almost the functional equivalent of an *en banc* decision. See *Newman* at 5, n.1.

Memorandum of Law

6. This court has jurisdiction to recall its mandate at any time during the current term of this court, i.e., from July 8, 1997 through January 12, 1998. See § 35.10, *Fla. Stat.* (1995). See also *State Farm Mutual Automobile Insurance Co. v. Judges of the District Court of Appeal, Fifth District*, 405 So.2d 980 (Fla. 1981) and *Judges of the Eleventh Judicial Circuit vs. Janovitz*, 635 So.2d 19 (Fla. 1994):

> An appellate court may recall a mandate before its term of court ends in order to revisit the cause.

635 So.2d at 20, *citing with approval, State Farm, supra.*

7. In *Theisen v. Old Republic Insurance Co.*, 468 So.2d 434 (Fla. 5th DCA 1985), this court held that a change in case law cannot result in the withdrawal of a prior opinion if the mandate thereon was issued in a prior term of court. The converse corollary, of course, is that the court

can, and should, withdraw its prior opinion where the case law does change during the same term as the mandate issues – which is the situation presented herein. And indeed, in *Brunner Enterprises, Inc. v. Department of Revenue*, 452 So.2d 550 (Fla. 1984), the Florida Supreme Court expressly acknowledged that an appellate court can and should reconsider the law of the case "in those situations where strict adherence to the rule would result in 'manifest injustice' ". 452 So.2d at 552-53. *Quoting with approval, Strazzulla v. Hendrick*, 177 So.2d 1 (Fla. 1965), *quoting from Beverly Peach Properties v. Nelson*, 68 So.2d 604 at 608 (Fla. 1953). *Brunner* continued by holding that:

> An intervening decision by a higher court is one of the exceptional situations in which a court will entertain a request to modify the law of the case.

452 So.2d at 553, *citing Strazzulla, supra.* Although the Seventh Circuit Court of Appeals may not be a "higher court", the Bryans submit that it is at least a court of equal dignity with this court and entitled to substantial persuasive weight – not only because it is a federal appellate court with experience in interpreting the particular federal law under scrutiny herein, but because it has a proven track record of accurately interpreting said law in a manner subsequently adopted by the United States Supreme Court. *Heintz v. Jenkins*, ___ U.S. ___, 115 S.Ct. 1489 (1995), *affirming* 25 F.3d 536 (7th Cir. 1994).

Conclusion

8. The Bryans' earlier foreshadowing of the result in *Newman* is no longer mere educated forecasting, but reality. This court has an opportunity to realign itself on its construction of this federal law with the same enlightened Seventh Circuit Court of Appeals that was affirmed by the Supreme Court in *Heintz* – and in doing so, to spare multitudes of homeowners and condominium owners from the abuses the FDCPA was enacted to prevent. It would be a manifest miscarriage of justice for this court's decision of May 9, 1997 to remain the law of the case where, as here, its underpinnings have been emasculated by three successive Seventh Circuit Court of Appeals decisions, the latest of which is on all fours with the case *sub judice*.

WHEREFORE, the Bryans move the court to stay or recall its mandate, as applicable, and revisit this cause in light of *Newman*.

Certificate of Service

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail this 9th day of July, 1997 to Kenneth M. Clayton, Esq., Clayton & McCulloh, 1065 Maitland Center Commons Blvd., Maitland, FL 32751 and Randy Hillman, Esq., 203 Hillcrest Street, Orlando, FL 32803.

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IN THE STATE OF FLORIDA
FIFTH DISTRICT COURT OF APPEAL

5TH DCA CASE NO.: 96-2406
L.T. CASE NO.: CI95-5032

KEVIN E. BRYAN and RENEE M. BRYAN, his wife,

Appellants,

vs.

KENNETH M. CLAYTON and NEAL McCULLOH, individually and d/b/a CLAYTON & McCULLOH, A Florida General Partnership,

Appellees.

_____/

RESPONSE TO APPELLANTS' MOTION TO STAY OR RECALL MANDATE AND APPELLEES' MOTION FOR IMMEDIATE ISSUANCE OF MANDATE

COME NOW, the Appellees, KENNETH M. CLAYTON and NEAL McCULLOH, individually and d/b/a CLAYTON & McCULLOH, A Florida General Partnership, pursuant to Rule 9.300(a), Fla.R.App.Pr., and in response to Appellants' Motion to Stay or Recall Mandate and would state as follows:

ARGUMENT I

THE *NEWMAN* CASE IS ADVISORY, AT BEST, AND IS NOT CONTROLLING OF THE RESULT IN THIS CASE

1. It is well settled law in Florida that an appellate court must apply the law as it exists at the time the appeal is decided, even if there has been a change since the time of trial. *See e.g. Lowe vs. Price*, 437 So. 2d 142 (Fla. 1983); *Wheeler vs. State*, 344 So. 2d 244 (Fla. 1977).

2. An appellate "decision" encompasses the opinion and the judgment. *Seaboard ALR Co. v. Branham*, 104 So. 2d 356 (Fla. 1958); *See also Zirin vs. Charles Pfizer & Co.*, 128 So. 2d 594 (Fla. 1961).

3. A "decision" is entered as of the date shown on the order or decision. Rule 9.340(a), Fla.R.App.Pr.

4. In the instant case, the opinion and judgment affirming the trial court was entered by this court on May 9, 1997. This decision was ratified and approved upon the denial of Appellants' Motion for Rehearing, which denial was dated June 25, 1997.

5. The case of *Newman vs. Boehm, Pearlstein & Bright, Ltd.*, Nos. 96-2839 and 96-2841, ___ F.3d ___ (7th Cir. July 2, 1997) was not decided until after the denial of the Appellants Motion for Rehearing. Therefore, this court properly applied the law in effect at the time the case was decided, to wit; June 25, 1997.

6. The *Newman* case is not controlling in the instant lawsuit.

7. As the Appellees have continuously argued, the federal case law on this subject is merely advisory to this

court. The federal case law is not, however, legally binding upon this court.

8. If one were to assume that the federal case law were in fact binding upon this court, then the case of *Azar v. Hayter*, 874 F. Supp. 1514, (N.D. Fla. 1995), *aff'd without op.*, 66 F.3d 342 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 712 (1996), would be most binding in that it arose out of the Northern District of Florida, was appealed to our federal circuit (the 11th Circuit), and review was denied by the United States Supreme Court. *Newman* arises from a distant circuit (the 7th Circuit), and establishes nothing more than a conflict among the federal circuits. Furthermore, the decision in *Newman* is not final until after the time for rehearing elapses and/or an appeal is taken to the United States Supreme Court.

9. This conflict among the federal circuits may ultimately be resolved by the United States Supreme Court. Any decision by the United States Supreme Court would clearly be binding upon this court. However, unless and until the United States Supreme Court resolves this issue, a conflict among federal circuits is an insufficient basis upon which to deny issuance of the mandate or further delay the final resolution of the instant appeal.

10. To grant the relief requested by the Appellants is an extraordinary remedy. The cases cited by the Appellants all dealt with circumstances in which the change in the decisional law was in fact absolutely legally binding upon the lower tribunal. This is not the circumstance in the instant lawsuit.

ARGUMENT II

THE TERM OF COURT IN WHICH THE JUDGMENT WAS "RENDERED" HAS EXPIRED

11. An appellate "decision" encompasses the opinion and the judgment. *Seaboard ALR Co. vs. Branham*, 104 So. 2d 356 (Fla. 1958); *see also Zirin vs. Charles Pfizer & Co.*, 128 So. 2d 594 (Fla. 1961).

12. The issuance of the mandate is a routine ministerial function most often performed by the clerk of the court in which the decision is rendered. *See* Rule 9.340(a), Fla.R.App.Pr.; *See also Eldred vs. Reber*, 639 So. 2d 1086 (Fla. 5th DCA 1994).

13. Rule 9.340, Fla.R.App.Pr., ". . . . communicates clearly that rendition applies to an order of the court, not the issuance of the mandate." *Eldred*, 639 So. 2d 1086.

14. Pursuant to § 35.10, Fla. Stat., ". . . . the district courts of appeal shall hold two regular terms each year . . . commencing respectively on the second Tuesday in January and July." Section 35.10, Fla. Stat. (1995).

15. In their Motion to Stay or Recall Mandate, Appellants cite the case of *State Farm Mutual Automobile Insurance Co. vs. Judges of the District Court of Appeal, Fifth District*, 405 So. 2d 980 (Fla. 1981), for the proposition that ". . . . an appellate court may recall a mandate before its term of court ends in order to revisit the case."

16. It should be noted that, with respect to recalling the mandate of the appellate court, the *State Farm* case cites to and is based upon the Florida Supreme Court's holding in the case of *Chapman vs. St. Stephens Protestant Episcopal Church, Inc.*, 138 So. 630 (Fla. 1932).

17. In *Chapman*, the Florida Supreme Court stated:

> . . . . a majority of the court have reached the conclusion that the correct rule, which should be recognized and applied in such situation, is that the jurisdiction of this court, like the jurisdiction of courts generally, persists to the end of the term and then terminates, but that, *during the term at which a judgment of this court is rendered*, this court has jurisdiction and power which it may exercise, as the circumstances and justice of the case may require, to reconsider, revise, reform, or modify its own ***judgments*** for the purpose of making the same accord with law and justice, and that it has power to recall its own mandate for the purposes of enabling it to exercise such jurisdiction and power in a proper case. [emphasis supplied]

Chapman, 138 So. 2d at 632.

18. In line with *Chapman*, several other Florida cases have held that appellate courts have ". . . . the power [sic] recall its [sic] mandate *so long as* recall is within the term during which the ***opinion*** was issued." [emphasis supplied] *See, e.g. Owens vs. State*, 444 So. 2d 951 (Fla. 2nd DCA 1984); *See also United Faculty of Florida Local 1847 vs. Board of Regents, State University System*, 423 So. 2d 429 (Fla. 1st DCA 1982). Both of these cases cite to *State Farm* for the authority of a reviewing court to recall its mandate during the term in which the ***opinion*** was issued.

19. As held by this court in *Eldred*, ". . . . time begins to accrue when the appellate decision is "rendered" as

that term is defined in Florida Rule of Appellate Procedure 9.020(g)." *Eldred*, 639 So. 2d 1086.[1] "Rendition" occurs when the opinion is filed with the clerk of the court, not when the mandate is issued. *Eldred*, 639 So. 2d 1086.

20. In the instant action, the decision of this court was rendered, at the very latest, on June 25, 1997, the date that the Appellants' Motion for Rehearing was denied. Therefore, the decision was rendered during the January, 1997 term of court which term commenced on January 13, 1997, and ended on July 7, 1997.

21. The mandate was to be issued in the instant action on July 10, 1997, fifteen days after the denial of the Appellants' Motion for Rehearing. Therefore, the mandate was to be issued during the July, 1997 term of court which commenced on July 8, 1997.

22. All of the case law cited by the Appellant which permits the court to withdraw its mandate during the current term of court arise out of circumstances in which the rendition of the order and issuance of the mandate are in the ***same term of court***.

23. Appellees have been unable to locate any case law which addresses the particular and unusual circumstances of this case, to wit; when the order is rendered in

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[1] The issue presented in *Eldred*: when does a statute of limitations for litigational malpractice begin to accrue – the date the order is "rendered" or the date that the mandate is issued? While the instant case is not a "statute of limitations" case, as will be argued herein, the time delay between the rendition of the order and issuance of the mandate is equally critical in the instant action.

one term of court and the mandate is issued in the following term of court.

24. An appellate mandate is a notice from the appellate court to the trial court of the decision rendered in the cause. The mandate is a ministerial function of the clerk of the appellate court. *See* Rule 9.340, Fla.R.App.Pr.

25. As stated in the commentary to Rule 9.340, Fla.R.App.Pr., "The 15-day delay in issuance of mandate is necessary to allow a stay to remain in effect for purposes of rule 9.310(e)." The commentary to this rule also states that "The power of the court to expedite as well as delay issuance of the mandate, with or without motion, has been made express." Rule 9.340, Fla.R.App.Pr.

26. Rule 9.310(e) states "A stay entered by a lower tribunal shall remain in effect during the pendency of all review proceedings in Florida courts until a mandate issues, or unless otherwise modified or vacated." Rule 9.340(e) [sic], Fla.R.App.Pr.

27. Clearly, the procedural time delay between the rendition of the order and the ministerial function of the reviewing court issuing its mandate is to provide the lower tribunal with time to issue such necessary orders and/or make such necessary preparations for complying with the mandate of the reviewing court.

28. In the instant action, no stay was ever issued by the lower tribunal.

29. In the case of *Orange Federal Savings & Loan Association vs. Dykes*, 444 So. 2d 1152 (Fla. 5th DCA 1984), this court recognized that a brief time period between the issuance of the mandate and the close of a term of court

may result in a hardship, but nonetheless mandates denial of the motion for lack of subject matter jurisdiction.

30. In *Orange Federal*, the judgment was rendered on June 23, 1983 and the mandate was issued on July 11, 1983, both during the January, 1983 term of court. *Id.* at 1152. The July, 1983 term of court began on July 12, 1983. *Id.* at 1153.

31. In denying the belated motion for rehearing for lack of subject matter jurisdiction, this court, quoting with approval from *State Farm*, 405 So. 2d 980, stated "All things must have an end. This case has ended." *Orange Federal*, 444 So. 2d at 1153.

32. The term of court in which the "judgment" of this court was "rendered" ended on July 7, 1997. Therefore, the jurisdiction of this court to recall and/or reconsider that judgment ended on July 7, 1997. This conclusion should not be effected by the purely ministerial function of the issuance of this court's mandate, which mandate could have been issued immediately after the entry of the Order Denying Appellants' Motion for Rehearing on June 25, 1997. In the instant case, had the mandate been immediately issued after the denial of Appellants' Motion for Rehearing, Appellants' instant motion would be moot due to the fact that their motion was filed on July 9, 1997, after the end of the January, 1997 term of court.

WHEREFORE, For the reasons stated above, this case is at an end. Appellants' Motion to Stay or Recall Mandate should be denied, and the mandate of this court should be immediately issued.

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Strike has been mailed to KENNETH L. MANN, ESQ., 39 West Pine Street, Orlando, Florida 32801, this 18th day of July, 1997.

/s/ James E. Olsen
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IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

KEVIN E. BRYAN and RENEE M. BRYAN,

Petitioners,

vs.

KENNETH M. CLAYTON, et al.,

Respondents,

DISCRETIONARY PROCEEDING TO REVIEW DECISION OF 5TH DCA CASE NO. 96-2406

PETITIONERS' BRIEF ON JURISDICTION

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PREFACE

The plaintiffs/petitioners, Kevin E. Bryan and Renee M. Bryan, will generally be referred to in this brief as "the homeowners" or "the Bryans" or "the petitioners", or individually, as "Kevin" or "Renee". The defendants/respondents, Kenneth M. Clayton and Neal McCulloh, and their law firm partnership will generally be referred to individually as "Clayton" and "McCulloh", or collectively as "the law firm". Defendant/respondent Amber Ridge Homeowners' Association, Inc., will be referred to generally as "the homeowners' association". References to the Appendix are designated "(APX. ___)".

I. GROUNDS FOR INVOKING JURISDICTION.

Petitioners invoke the discretionary jurisdiction of this court pursuant to Florida Constitution Article V, Section 3(b)(3) and Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv), as construed by this court in *Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1988) and as elaborated upon below.

II. OPERATIVE JURISDICTIONAL FACTS.

The lower court decision, *Bryan v. Clayton*, 698 So.2d 1236 (Fla. 5th DCA September 12, 1997) (APX. 1-2, 4-7),

expressly interpreted key definitional provisions of a federal law (the federal Fair Debt Collection Practices Act, 15 U.S.C. Section 1692, *et seq.*, hereafter the "FDCPA" or "the Act") and virtually identical provisions in its Florida law counterpart (the Florida Consumer Collection Practices Act, Section 559.55, *et seq., Fla. Stat.* (1993), hereafter "the Florida Act") in a manner directly contrary to the federal Seventh Circuit Court of Appeals decision in *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. July 2, 1997). *Bryan* declined to follow *Newman* even through *Newman* expressly reversed the latest of the five federal district court decisions relied upon in *Bryan*, namely, *Riter v. Moss & Bloomberg, Ltd.*, 932 F.Supp. 210 (N.D. Ill. 1996)[1], and even though, as discussed *infra*, Florida case law has long urged our state judiciary to look to the federal court's interpretation if a federal statute and a copycat state statute are involved and no public policy of Florida appears inconsistent with the federal case law.

Specifically, *Bryan* held, contrary to *Newman*, that the protections of the FDCPA and the Florida Act do *not* extend to homeowners and condominium owners who are subjected to abusive debt collection practices over allegedly delinquent dues and assessments. (APX 1-2, 4-7).

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[1] *Newman* has since been followed (and the *Bryan* line of authorities further criticized) in a comprehensive opinion in *Thies v. Wyman*, 969 F.Supp. 604, 607 (S.D. Cal. 1997). Both cases are included in the Appendix herein for the court's convenience.

III. STATEMENT OF THE CASE.

The homeowners sued the law firm in Orange County Circuit Court. The law firm prevailed on summary final judgment and a timely appeal was taken. The district court of appeal affirmed with an opinion, as noted above (APX. 1), and thereafter denied clarification, rehearing, certification and rehearing *en banc* on June 25, 1997. (APX. 8). Before the mandate issued, however, the *Newman* decision was entered on July 2, 1997 (APX. 10), whereupon the homeowners timely moved to stay or recall the mandate by reason thereof. Ultimately, the motion was denied by opinion entered September 12, 1997. (APX. 1-2, 6-7). The mandate was thereafter issued on October 1, 1997 (APX. 3), and the homeowners timely filed their notice with the district court of appeal to invoke this court's discretionary jurisdiction on Monday, October 13, 1997.

IV. SUMMARY OF ARGUMENT.

Bryan presents decisional conflict under *Florida Star, supra,* because:

(1) *Bryan* fails to follow a well-reasoned federal appellate case on all fours (*Newman*) in interpreting a federal statute, the applicable provisions of which are replicated virtually verbatim in the Florida Act[2];

---

[2] *Compare* 15 U.S.C. Section 1692a(5) ("debt") *with* Section 559.55(1), *Fla. Stat.* (1993) (" 'debt' or 'consumer debt' "):

> [M]eans ***any*** obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services

(2) *Bryan* fails to articulate (and would be hard pressed to do so) how or why the federal case (*Newman*) is incompatible with Florida public policy; and

(3) Prior district courts of appeal and Florida Supreme Court opinions have been explicit that federal court opinions on federal law and Florida copycat law should be followed ***unless*** the court can demonstrate cogent public policy arguments not to do so. (Additionally, although the issue is unavoidably intertwined with the ultimate merits of the case, *Bryan* may also be said to present decisional conflict to the extent its express finding that the FDCPA and the Florida Act have no plain and clear meaning (contrary to the finding *in Newman, Thies* and the cases relied upon therein), may be viewed as a search for ambiguity, and, thus, the misapplication of this court's mandate to look to the ordinary meaning of words and their reasonable implications. *See, e.g., Savona v. Prudential Insurance Co.*, 648 So.2d 705, 707 (Fla. 1995), *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984), and *In re McCollam (LeCroy v. McCollam)*, 612 So.2d 572, 573 (Fla. 1993)). See also *State v. Egan*, 287 So.2d 1, 4 (Fla. 1973) (courts should use rules of statutory construction to remove doubt, not to create doubt).

> which are the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment. [emphasis added]

Similarly, *compare* 15 U.S.C. Section 1692a(3) ('consumer') *with* Section 559.55(2), *Fla. Stat.* (1993) (" 'debtor' or 'consumer' "):

> [M]eans ***any*** natural person obligated or allegedly obligated to pay ***any*** debt. [emphasis added]

V. JURISDICTIONAL ARGUMENT.

Although the homeowners recognize that federal court decisions are not necessarily binding on state courts, Florida has a tradition for over 60 years that where (as here) the case involves the interpretation or construction of a federal statute, or (as also exists herein) the interpretation of a state statute which, in pertinent part, is virtually identical to a federal statute, then the state court should adhere to a ***reasoned*** federal case unless the federal case fails to comport with some fundamental contrary policy of Florida. See, e.g., *State v. Cook*, 108 Fla. 157, 146 So. 223 (1933) (look to federal court interpretation of similar federal statute where not "inharmonious with spirit and policy of state legislation"). *See also, State v. Jackson*, 650 So.2d 24 at 27 (Fla. 1995):

> A long-standing rule of statutory construction in Florida recognizes that if a state law is patterned after a federal law on the same subject, the Florida law will be accorded the same construction as given to the federal act in the federal courts. *Gay v. Inter-County Tel. & Tel. Co.*, 60 So.2d 22 (Fla. 1952); *O'Loughlin v. Pinchback*, 579 So.2d 788, 791 (Fla. 1st DCA 1991) (statutory construction should be the same to the extent the construction is harmonious with the spirit of the Florida legislation).

Bryan neither stated, demonstrated, nor implied that the *Newman* analysis is in any manner inconsistent with the spirit and policy of Florida law. Moreover, the homeowners submit that the *Bryan* court would have been unable to do so, because if anything, the Florida legislative intent is even broader and more pro-consumer than the FDCPA. For example, the Florida Act provides:

> [I]n the event of any inconsistency between any provision of [the Florida Act] and any provision of [the FDCPA], the provision which is more protective of the consumer or debtor shall prevail.

Section 559.552, *Fla. Stat.* (1993).

Thus, while *Bryan* expressly conflicts with *Newman* (and *sub silentio* conflicts with *Thies*) on the merits, the conflict for jurisdictional purposes is not so much with *Newman* and *Thies*, but with *Cook, Jackson, Gay* and *O'Loughlin, supra*, all of which urged Florida courts to adopt well-reasoned federal case law where a federal statute is involved and where Florida public policy would not be offended and, *sub judice*, would be furthered by such an outcome. Indeed, just the type of conflict as presented herein may be what that this court envisioned in *Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1988):

> This court in the broadest sense has subject-matter jurisdiction under Article V Section 3(b)(3) of the Florida Constitution, over *any* decision of a district court that expressly addresses ***a*** question of law within the four corners of the opinion itself. [emphasis added]

530 So.2d at 288. Similarly, this court continued:

> Thus, it is ***not*** necessary that conflict actually exist for this court to possess subject-matter jurisdiction, only that there be some statement or citation in the opinion that hypothetically ***could*** create conflict [with the decision of another district court of appeal or of the supreme court] ***if*** there were another opinion reaching a contrary result. [emphasis added]

> As the final authority on the meaning of the Florida Constitution[,] this Court has the final and inherent power to determine what constitutes express and direct conflict . . .
>
> This, by definition, is discretion, not jurisdiction.

530 So.2d at 288. Admittedly, the foregoing may be viewed as an arduous path to jurisdiction, as it requires that one take a panoramic rather than myopic view of the phrase "the same question of law" for purposes of Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv). However, the homeowners respectfully urge that *Florida Star* requires this result. And, *Florida Star* has been reaffirmed as recently as two weeks ago. *Beaty v. State*, 22 Fla. L. Weekly S626 (Fla. Oct. 9, 1997).

Accordingly, if this court disagrees with the homeowners' analysis and declines to accept discretionary review, the homeowners urge that the court concurrently consider the merits of prospectively receding from *Florida Star* in cases of state court/federal court conflict on federal questions, so that future, similarly-situated litigants can save funds, time and trees, and apply directly from the district court of appeal to the United States Supreme Court for certiorari, where the conflict jurisdiction is explicit. *See* United States Supreme Court Rule 10.1(b):

> When a state court of last resort has decided a federal question in a way that conflicts with the decision of . . . a United States Court of Appeals.

VI. STATEMENT OF IMPORTANCE OF REVIEW.

It should be self-evident that this decision has far-reaching implications beyond the immediate parties – ultimately, it has a direct or indirect bearing on every condominium owner in the State of Florida, as well as every homeowner who lives in a subdivision having a homeowners' association with assessment powers. In fact, even though the lower court declined to certify the issue to this court (APX. 8), it did specifically find in its May 12, 1997 order under Section 768.79, *Fla. Stat.* (1995), that:

> The question of law at issue was well presented on appeal and would be considered 'close'.
>
> The suite [sic] was in the nature of a test case presenting questions of far-reaching importance in Florida affecting non-parties who are charged with collecting condominium assessments or are obligated to pay them.

(APX. 9).

It is fundamental that the FDCPA and the Florida Act protect Florida citizens against debt collectors who improperly hound them for their failure to pay for retail purchases at, say, a shopping center. It is also clear that consumers protected under the FDCPA were intended by Congress to include not only those who buy personal property, but those whose debt is secured by real estate. *See, e.g.*, 15 U.S.C. Section 1692i(a)(1). Similarly, it is well-established that Florida endeavors to protect the sanctity of the home and the homestead. *See, e.g., Bessemer Properties, Inc. v. Gamble*, 158 Fla. 38, 27 So.2d 832 (1946); *Orange*

Brevard Plumbing & Heating Co. v. La Croix, 137 So.2d 201 (Fla. 1962); and *Graham v. Azar*, 204 So.2d 193 (Fla. 1967).

Yet, *Bryan* appears to be at odds with the foregoing public policies. A pundit might quip, with but only slight exaggeration, that unless jurisdiction is accepted in Tallahassee or Washington and the lower court is reversed, the decision in *Bryan* makes Florida residents safer in the malls than in their homes.

CONCLUSION

WHEREFORE, the homeowners urge this court enter an order accepting discretionary review of this cause.

Certificate of Service

I HEREBY CERTIFY that a true copies hereof and of the Appendix hereto have been furnished by U.S. Mail this 23rd day of October, 1997 to Kenneth M. Clayton, Esq., Clayton & McCulloh, 1065 Maitland Center Commons Blvd., Maitland, FL 32751 and Randy Hillman, Esq., 203 Hillcrest Street, Orlando, FL 32803.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 91,612

KEVIN E. BRYAN and RENEE M. BRYAN,

Petitioners,

vs.

KENNETH M. CLAYTON, et al,

Respondents.

DISCRETIONARY PROCEEDING TO REVIEW DECISION OF 5TH DCA CASE NO.: 96-2406

RESPONDENTS' BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The Plaintiffs/Petitioners, Kevin E. Bryan and/or Renee M. Bryan, will collectively be referred to in this jurisdictional brief as the "Bryans" or the "Petitioners". The Defendants/Respondents, Kenneth M. Clayton and/or Neal McCulloh individually or doing business as Clayton & McCulloh, will be collectively referred to in this jurisdictional brief as "Clayton & McCulloh" or "the Respondents." The term "trial court" shall refer to the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, the Honorable James C. Hauser presiding. The term "Appellate Court" shall refer to the Fifth District Court of Appeal located in Daytona Beach, Florida.

References to the Bryans' Brief on Jurisdiction, if any, shall be designated "Pet.Br. at ___". References to the

Bryans' Appendix to Petitioners' Brief on Jurisdiction shall be designated "Pet.Appx. at ___".

RESPONDENTS' STATEMENT OF THE CASE

Respondents concur with the Bryans' Statement of the Case (Pet.Br. at 2), with the following significant exception.

The Bryans' notice to invoke the discretionary jurisdiction of the Florida Supreme Court, which was filed with the Fifth District Court of Appeal on October 10, 1997, was *not timely* filed pursuant to law and the rules of appellate procedure.

SUMMARY OF ARGUMENT

The Bryans' Notice to Invoke the Discretionary Jurisdiction of the Florida Supreme Court was not timely filed within 30 days of rendition of the order to be reviewed. The decision of the Fifth District Court of Appeal, entered on May 9, 1997, and from which the Bryans' sought to directly seek discretionary review, was "rendered" on June 25, 1997. The Bryans' Motion to Stay or Recall Mandate and Notice of Filing Supplemental Authority, filed with the Fifth District Court of Appeal on or about July 9, 1997, is not an authorized motion which tolled rendition of the decision.

The Appellate Court's order On Motion to Stay or Recall Mandate is a non-appealable interlocutory order by which the Appellate Court refuses to recall its previously rendered decision. Therefore, the Bryans' notice to invoke the discretionary jurisdiction of this court was not

timely filed within 30 days of rendition as required by the Florida Rules of Appellate Procedure.

Secondly, the decision rendered in the instant case by the Appellate Court does not expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. The issue presented in this case is one of *first impression* before the appellate courts of the State of Florida. As such, it is impossible that the decision rendered by the Appellate Court expressly and directly conflicts with any prior Florida decisional law on the same question of law presented herein, to wit: homeowners' association and condominium association assessments are not a "debt" within the meaning of the Federal Fair Debt Collection Practices Act or the Florida Consumer Collection Practices Act.

Lastly, the Bryans' contention that there may be ". . . . far-reaching implications. . . . " or, in other words, that this is a matter of great public importance, is an insufficient and improper basis to confer jurisdiction in the supreme court. Only a district court of appeal may certify to the Florida Supreme Court a question of great public importance. In the instant matter, the Appellate Court refused to certify the question. As such, the supreme court lacks "great public importance" jurisdiction in the instant cause.

THE BRYANS' NOTICE TO INVOKE THE DISCRETIONARY JURISDICTION OF THE FLORIDA SUPREME COURT WAS NOT TIMELY FILED WITHIN 30 DAYS OF RENDITION OF THE DECISION IN THE INSTANT CAUSE.

Rule 9.020(h), Fla.R.App.Pr. (1997), defines when an order is rendered. This rule provides that an order is "rendered" when a signed copy of the order is filed with the clerk of court. *Id.* The rule also expressly provides for the limited types of motions which will toll rendition. *Id.* The commentary to Rule 9.020 states that "[t]o postpone rendition the motion must be timely, authorized, **and one of those listed**." *Id.* Pursuant to Rule 9.300(d)(2), Fla.R.App.Pr. (1997), motions which ***do not*** toll time are ". . . . motions for stay pending appeal, rule 9.310." Rule 9.310, Fla.R.App.Pr. (1997), governs stays of final orders pending review. The commentary to Rule 9.310 states that "[t]his rule interacts with rule 9.340, however, so that a party has 15 days between rendition of the court's decision and issuance of mandate. . . . to **move for a stay of mandate pending review**."

Rule 9.120, Fla.R.App.Pr. (1997), provides that in order to invoke the discretionary jurisdiction of the Florida Supreme Court, the notice must be filed with the district court of appeal within ". . . . 30 days of rendition of the order to be reviewed." The timely filing of a notice to invoke discretionary review in the supreme court is jurisdictional and the failure to timely file the notice precludes discretionary jurisdiction. *See, e.g. Roy vs. State*, 211 So. 2d 554 (Fla. 1968); *See also* Commentary to Rule 9.120, Fla.R.App.Pr. (1997).

In the instant case, the decision was filed in the Appellate Court on May 9, 1997. On May 27, 1997, the Bryans timely filed their Motion for Clarification, Rehearing, Rehearing En Banc, and Certification, and for Ancillary Relief. Pursuant to the rules of appellate procedure, the Bryans Motion for Rehearing, etc., clearly tolled the

time for filing a notice seeking to invoke the discretionary jurisdiction of the supreme court. On June 25, 1997, the Bryans Motion for Rehearing, etc., was denied by the Appellate Court. (Pet.Appx at 8). Therefore, pursuant to Rule 9.020(h), Fla.R.App.Pr. (1997), the May 9, 1997 decision was "rendered" on June 25, 1997. Therefore, the notice to invoke discretionary jurisdiction of the supreme court ***MUST*** have been filed within 30 days from and after June 25, 1997, to wit; on or before July 25, 1997.

On July 9, 1997, the Bryans filed with the Appellate Court their Motion to Stay or Recall Mandate, and Notice of Supplemental Authority. This motion is not an authorized motion which would either postpone rendition of the decision or toll the time for filing a notice seeking discretionary review. The filing of an authorized motion is required in order to toll the time for seeking discretionary review before the supreme court. *See Wagner vs. Bieley, Wagner & Associates, Inc.*, 263 So. 2d 1 (Fla. 1972) (motions directed to interlocutory orders cannot operate to toll the time for filing interlocutory appeal); *See also Lipsius vs. Bristol-Myers Company*, 269 So. 2d 680 (Fla. 1972) (petition to certify question as one of great public importance is not an authorized motion which delays rendition).

The commentary to Rule 9.120, Fla.R.App.Pr. (1997), clearly contemplates the filing of ***both*** a notice seeking discretionary review ***and*** a motion to stay pending review. The right to file both a notice and a motion to stay was expressly recognized by this court in *State vs. Roberts*, 661 So. 2d 821 (Fla. 1995).

The Bryans filed their Notice to Invoke Discretionary Jurisdiction with the Appellate Court on October 10, 1997, which date is 107 days after rendition of the Appellate Court's decision. The order On Motion to Stay or Recall Mandate is a non-appealable interlocutory type order which does not alter the rendition date of the Appellate Court's decision. As clearly stated in the order On Motion to Stay or Recall Mandate ". . . . we decline to recall our mandate and **reconsider our prior affirmance**." [emphasis supplied] (Pet.Appx. at 5) It is clear from the face of this order that the Appellate Court was neither issuing a new opinion nor amending or modifying its prior decision. As such, the decision entered by the Appellate Court on May 9, 1997, was rendered on June 25, 1997, i.e., the date the Bryans' Motion for Rehearing, etc. was denied. In the instant action, a notice to invoke the discretionary jurisdiction of this court ***must***, therefore, have been filed on or before July 25, 1997.

Furthermore, it would appear well settled law in Florida that an appellate court may, in the interest of justice, recall its mandate at any time during the term of court in which the mandate is issued. A holding by this court that a motion to recall or stay mandate (such as the motion filed herein by the Bryans) operates to toll the filing of a notice to invoke discretionary jurisdiction would have the absurd result of extending almost indefinitely the time for filing a notice to invoke the discretionary jurisdiction of the supreme court.[1]

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[1] As required by § 35.10, Fla. Stat., the district courts of appeal have two six month terms each year. If a motion to stay or recall mandate is held by this court to be an "authorized

The Bryans' Notice to Invoke Discretionary Jurisdiction was untimely filed on October 10, 1997. The failure of the Bryans to timely seek discretionary review in the supreme court is jurisdictionally fatal.

THERE IS NO "EXPRESS AND DIRECT" CONFLICT OF THE DECISION RENDERED BY THE FIFTH DISTRICT COURT OF APPEAL IN THE INSTANT CAUSE AND THE DECISIONS OF ANY OTHER DISTRICT COURT OF APPEAL OR THE SUPREME COURT ON THE SAME QUESTION OF LAW.

Article V, § 3(b)(3), Fla. Const., and Rule 9.030(a)(2)(A)(iv), Fla.R.App.Pr. (1997), provide that the supreme court **may** review decisions of district courts of appeal that ". . . . expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law."

The supreme court's jurisdiction is a matter strictly proscribed by the state constitution. *E.g., Lawyers Title Insurance Corp., vs. Little River Bank & Trust Company,* 243 So. 2d 417 (Fla. 1970). The jurisdiction of the supreme court extends only to the narrow class of cases enumerated in Article V, Section 3(b) of the Florida Constitution. *E.g., Mystan Marine, Inc. vs. Harrington,* 339 So. 2d 200

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motion" tolling, or even more absurdly, **reviving** the time for filing a notice to invoke discretionary jurisdiction, then the time for filing such a notice is no longer 30 days after rendition of the decision, but instead could be months (or even years) between rendition of the decision, the filing of the motion to recall mandate, the resolution of that motion, and the filing of the notice to invoke discretionary jurisdiction.

(Fla. 1976). The conflict of the decisions must be express[2] and direct, i.e., it must appear within the four corners of the majority decision. *Reaves v. State*, 485 So. 2d 829 (Fla. 1986). Inherent or so called implied conflict may not serve as a basis for supreme court jurisdiction. *E.g., Dept. of Health and Rehabilitative Services vs. National Adoption Counseling Service, Inc.*, 498 So. 2d 888 (Fla. 1986). The conflict must be obvious and patently reflected in the decisions relied upon by the district court of appeal. *Trustees of the Internal Improvement Fund vs. O.H. Lobean*, 127 So. 2d 98 (Fla. 1961). A conflict must stem from divergent decisions on the same point of law by separate courts within the appellate jurisdictional system of the State of Florida. *Kyle vs. Kyle*, 139 So. 2d 885 (Fla. 1962). No conflict can arise if the points of law settled by the two cases are not the same. *Id.* at 887.

In the instant appeal, the decision in the case of *Newman vs. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. July 2, 1997) cannot constitute a conflict as that term has been defined by this court. The *Newman* case is not a case arising out of a court within the appellate jurisdictional system of the State of Florida.

The Bryans urge this court to accept jurisdiction based upon perceived and implied conflict between the decision in the instant case and the cases of *State v. Cook*, 108 Fla. 157, 146 So. 223 (Fla. 1933), *State v. Jackson*, 650 So. 2d 24 (Fla. 1995), *Gay v. Inter-County Tel. & Tel. Co.*, 60

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[2] In the case of *Jenkins vs. State*, 385 So. 2d 1356 (Fla. 1980), the court noted that "[t]he dictionary definitions of the term "express" include: "to represent in words"; "to give expression to." "Expressly" is defined: "in an express manner." *Id.* At 1359.

So. 2d 22 (Fla. 1952), and *O'Laughlin vs. Pinchback*, 579 So. 2d 788 (Fla. 1st DCA 1991). [hereinafter collectively referred to as the "Bryan Conflict Cases"].

As stated by the Bryans in their jurisdictional brief, all of the Bryan Conflict Cases stand for the proposition that it is a ". . . . long standing rule of statutory construction in Florida that if a state law is patterned after a federal law on the same subject, the Florida law will be accorded the same construction as given to the federal act in the federal courts." (Pet.Br. at 4). The single issue presented in the instant case is whether homeowners' association or condominium association assessments are a "debt" within the meaning of either the Federal Fair Debt Collection Practices Act or the Florida Consumer Collection Practices Act. Therefore, there is no "express and direct" conflict between the Bryan Conflict Cases and the instant lawsuit.

Furthermore, it is well settled law in Florida that appellate courts must apply the law as it exists at the time the appeal is decided. *See, e.g. Lowe vs. Price*, 437 So. 2d 142 (Fla. 1983). In the instant case, the decision of the Fifth District Court of Appeal was filed on May 9, 1997, and was rendered on June 25, 1997. The *Newman* case was decided on July 2, 1997. Therefore, *Newman* was decided ***AFTER*** rendition of the decision in the instant cause. The Appellate Court, therefore, properly applied the law *as it existed* on the date the instant decision was rendered. Therefore, there cannot even be an implied conflict between the instant decision and the Bryan Conflict Cases due to the fact that the Appellate Court properly applied the federal case law as it existed at the time the instant decision was rendered.

THE "IMPORTANCE OF REVIEW" AS ARGUED BY THE BRYANS IS NOT A PERMISSIBLE AND/OR SUFFICIENT BASIS TO VEST JURISDICTION IN THE SUPREME COURT OF FLORIDA.

The Bryans have argued that "[i]t should be self-evident that this decision has far-reaching implications beyond the immediate parties. . . . " (Pet.Br. at 6). The Bryans have also argued that ". . . . *Bryan* appears to be at odds with. . . . public policies." (Pet.Br. at 7).

Pursuant to Art. V, § 3(b)(4), Fla. Const., the Florida Supreme Court may ". . . . review any decision of a district court of appeal that passes upon a question **certified by it** to be of great public importance. . . . " Rule 9.030(a)(2)(A)(v), Fla.R.App.Pr. (1997), states that "[t]he discretionary jurisdiction of the supreme court may be sought to review decisions of district courts of appeal that pass upon a question certified to be of great public importance."

In *Lipsius vs. Bristol-Myers Company,* 269 So.2d 680 (Fla. 1972), this court specifically held that ". . . . certification must be upon motion of the Court and not by motion of a party to the cause." *Id.* at 681. *See also Allstate Insurance Co. vs. Langston,* 655 So. 2d 91 (Fla. 1995) (the Supreme Court does not have jurisdiction to review a decision of a district court of appeal based upon party's contention that the decision presents an issue of great public importance).

The Appellate Court refused to certify as a question of great public importance the issue presented in the

instant case. (Pet.Appx. at 6). Therefore, the Bryans' contention that there is an "importance of review" or that this matter presents, in effect, an issue of "great public importance" is wholly irrelevant and totally ineffective to confer jurisdiction upon this court.

CONCLUSION

For the reasons stated herein, the Bryans' notice to invoke discretionary jurisdiction of the supreme court is untimely or is otherwise ineffective to confer jurisdiction in the supreme court. Therefore, this court should summarily reject jurisdiction and dismiss the instant notice to invoke discretionary jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief on Jurisdiction has been mailed to KENNETH L. MANN, ESQ., Attorney for Petitioners, 105 E. Robinson Street, Suite 540, P.O. Box 551, Orlando, Florida 32802-0551, this 10th day of November, 1997.

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